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AND
BRIEF,

Supreme Court, U.S.
FILED
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No. 15-1509

In the Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, *et al.*,
Petitioners,

v.

THE VILLAGE AT LAKERIDGE, LLC, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners present four questions in support of their Petition:

1. Does the Ninth Circuit's decision create a split of authority among the circuits regarding the proper test to be employed to determine non-statutory insider basis?

2. Is the finding by the Ninth Circuit that the assignee of an insider claim is not automatically an insider an important decision warranting certiorari?

3. Does the Ninth Circuit's decision create a split of authority among the circuits that the assignee of an insider claim does not automatically remain the holder on an insider claim.

4. Is the Ninth Circuit's decision regarding the above an "important decision" warranting certiorari?

STATEMENT OF CORPORATE DISCLOSURE

In accordance with United States Supreme Court Rule 29.6, Respondent Village At Lakeridge, LLC discloses that it is wholly owned by MBP Equity Partner's 1, LLC, which is a privately held limited liability company in Nevada.

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DEFINITIONS APPLICABLE TO THIS BRIEF

"Petition"	shall mean the Petition For A Writ Of Certiorari filed by the Bank.
"BAP Opinion"	shall mean the Memorandum Of The United States Bankruptcy Appellate Panel Of The Ninth Circuit, filed April 5, 2015, in the case of The Village At Lakeridge, LLC., a copy of which is attached as Appendix B to the Petition. References to page numbers are to the number identified in the appendix.
"9th Cir. Opinion" or "Panel Decision"	shall mean the decision of the Ninth Circuit Court Of Appeals in the case In re The Village At Lakeridge, LLC, 814 F.3d 993 (9th Cir. 2016).
"Ninth Circuit" or "Panel"	shall mean the Ninth Circuit Court of Appeals, and the panel of judges who issued the decision.
"Supreme Court"	shall mean the Supreme Court of The United States.
"Rabkin"	shall mean Robert Rabkin.
"Bank"	shall mean the Petitioner.

"Debtor" or "Lakeridge"	shall mean the Respondent, The Village At Lakeridge, LLC.

STATEMENT OF THE CASE

I. Background

A. The Bankruptcy Court Decision

This case involves the confirmation of the Debtor's First Amended Plan of Reorganization (the "Plan") proposed in the bankruptcy case of The Village at Lakeridge, LLC (hereinafter "Debtor" or "Respondent"). Confirmation of the Plan was opposed by U.S. Bank National Association, As Trustee, As Successor-In-Interest To Bank of America, N.A., As Trustee, As Successor By Merger To LaSalle Bank National Association, As Trustee, For The Registered Holders Of Greenwich Capital Commercial Funding Corp., Commercial Mortgage Trust 2005-GG3, Commercial Mortgage Pass Through Certificates, Series 2005-GG3 (the "Trust"), By and Through, CWCaptial Assets Management LLC ("CWCAM"). CWCAM is an alleged Special Servicer for the Trust (hereinafter "Bank" or "Petitioner"). A claim against the Debtor held by MBP Equity Partner's 1, LLC ("MBP"), the Debtor's sole member, was sold to Rabkin. Rabkin voted in favor of the Plan, and was asserted by the Debtor as the accepting class under 11 U.S.C. § 1129(a)(10) of the Bankruptcy Code. The Bank misstates the facts in the Petition stating that the claim was purchased from Rabkin's "girlfriend." *See* Petition, p.3. The claim amount was $2.76 million, and the purchase price was $5,000.00. The bankruptcy court denied confirmation of the Plan on the basis that § 1129(a)(10) of the Bankruptcy Code had not been satisfied. Specifically, the bankruptcy court held that Rabkin's claim, having been purchased from an insider, remained an insider claim, and therefore the requirements of § 1129(a)(10)

had not been met. However, the bankruptcy court also concluded, following consideration of all the testimony, that Rabkin was not an non-statutory insider, and that there was no bad faith in the transaction.

The Debtor appealed the bankruptcy court's decision to the Ninth Circuit Bankruptcy Appellate Panel.

B. The Decision Of The Ninth Circuit Bankruptcy Appellate Panel.

On April 5, 2013, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") reversed the bankruptcy court's holding that Rabkin's vote could not be counted for the purpose of accepting the plan under § 1129(a)(10). However, the BAP also considered whether or not the common interest privilege applied to a conversation between counsel for Rabkin and counsel for the Debtor (see BAP Opinion, pages 56(a) through 60(a)). Specifically, Rabkin's counsel met with Debtor's counsel prior to the deposition of Rabkin to discuss the upcoming deposition. Both counsel asserted the common interest privilege at the time of Rabkin's deposition. The bankruptcy court confirmed that there was a common interest privilege, and prohibited inquiry into the conversation. However, the BAP noted that the bankruptcy court was apparently unaware that the Ninth Circuit had just issued a published opinion relating to the common interest privilege a few weeks earlier. *See* Pac. Pictures Corp. v. US District Ct., 679 F.3d 1121 (9th Cir. 2012). Based upon the Pac. Pictures Corp. decision, the BAP determined that the bankruptcy court did not make the necessary finding of whether or not there was an express or implied agreement between the parties to

pursue a joint strategy. *See* BAP Opinion, p.60a. Accordingly, the BAP vacated the portion of the decision regarding the discovery requests alleged to be protected by the common interest privilege, and remanded the matter to the bankruptcy court for further proceedings. Despite being given an opportunity to conduct further discovery on the relationship between Rabkin and the Debtor, the Bank took no action whatsoever, and instead appealed to the Ninth Circuit. The failure of the Bank to conduct additional discovery directly relates to the Bank's complaint that the bankruptcy court's factual conclusions were incorrect, or that the Panel failed to use the appropriate standard to review the factual findings of the bankruptcy court. The Bank should not be heard to complain about the factual findings of the bankruptcy court when it intentionally failed to conduct the additional discovery that was allowed by the BAP.

C. The Decision By The Ninth Circuit

The Ninth Circuit issued its published decision affirming the BAP's ruling on February 9, 2016. The Panel found that:

A. A third party does not become an insider as a matter of law by acquiring a claim form an insider.
B. Insider status pertains only to the claimant, it is not the property of a claim, and therefore general assignment law does not apply.
C. Rabkin was not a non-statutory insider because the closeness of relationship with the Debtor was not comparable to those factors enumerated in § 101(31) of the Bankruptcy Code, and the

relevant transaction was negotiated at arms length. Contrary to the statements of the Bank, the Panel did not create a "new test" for determining whether or not the purchaser of a claim is a non-statutory insider.

GROUNDS FOR CERTIORARI

The grounds for granting a writ of certiorari are set forth in Supreme Court Rule 10 which provides (in part):

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal questions in a way that conflicts with a decision by a state court of last resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) (omitted as not relevant in this case);
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been,

> but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The Supreme Court is not simply the next level of appeal from the Ninth Circuit. A split of opinion among the circuits on an important question is the premier criterion used by the Supreme Court to decide whether to grant certiorari. The conflict within the circuits must be intolerable and current. As discussed below, in this case there is no conflict among the lower federal courts regarding any of the issues relevant to this case, let alone one that is important or intolerable. As stated in Rule 10, a writ of certiorari is rarely granted when the error consists of alleged erroneous factual findings or the misapplication of a properly stated rule of law. In this case, the Bank's argument is really simply a complaint about erroneous standard of review for factual findings, or the misapplication of a stated rule of law, by the Ninth Circuit. Although the Bank goes to great lengths to manufacture a circuit split, or a compelling reason of national significance, the grounds for granting the Petition simply do not exist.

In order for a case to be of "exceptional importance" within the content of considering a writ of certiorari, it must extend beyond the narrow limits of the parties to affect an entire industry or a large segment of the population. As discussed below, although this case

may be important to the Bank, it does not affect an entire industry, large population, nor is it of national significance. It is not the type of "exceptional importance" warranting a review by the Supreme Court.

The 9th Cir. Opinion does not create a split of authority among the circuit courts. The Bank has created a fictional story that deviates significantly from the facts, as described in more detail below. It has misstated and misapplied cited cases, and taken quotes from the 9th Cir. Opinion out of context. The Bank has misstated the findings of the Panel, and has created its own interpretations and language entirely different from the decision by the Panel. This case is nothing more than an attempted third appeal of the facts and the law, and contains no compelling reasons for involvement of the Supreme Court.

REASONS FOR DENYING THE PETITION

I. There Is No Split Of Authority Among The Circuits Regarding The Proper Test To Be Employed To Determine Non-Statutory Insider Status.

The implication in the Petition is that the 9th Cir. Opinion creates a circuit split regarding the proper test to determine non-statutory insider status. This argument is based upon the Bank's misunderstanding, or misrepresentation, of relevant circuit court decisions, and a misstatement of the 9th Cir. Opinion. In fact, for the reasons set forth below, the 9th Cir. Opinion is exactly consistent with other circuit court decisions.

A. The Panel Employed the Proper Legal Standard for Determining Whether A Person Is a Non-Statutory Insider.

The Bank takes issue with the Panel majority's statement that in determining non-statutory insider status courts must look to "(1) the closeness of the relationship with the debtor that is comparable to that of the enumerated insider classifications in § 101(31), and (2) the relevant transaction is negotiated at less than arms length" (citations omitted). Village at Lakeridge, 814 F.3d at 1001. The Bank claims that the phrase "comparable to that of the enumerated insider classifications in §101(31)" somehow imposes an additional standard for determining non-statutory insider status that is in conflict with other circuit decisions. The Bank even goes so far as to state that the panel imposed "an additional requirement that the relationship must be the functional equivalent of a statutory insider." *See* Petition, page 26. This is, of course, not at all what the Panel found, and is simply an unsupported fictional statement imagined by the Bank.

The applicable circuit law in dealing with the determination of non-statutory insider status is not at all inconsistent with the standards employed by the Panel. In the case of In re: U.S. Medical, Inc., 531 F.3d 1272, 1277 (10th Cir. 2008), cited by the Bank, the court held "The inquiry then is whether there is a close relationship and whether there is anything other than closeness to suggest that any transactions were not conducted at arms length" (citation omitted). In the case of In re: Longview Aluminum, LLC, 657 F.3d 507, 509 (7th Cir. 2011), also relied upon by the Bank, the

court cited S.Rep.N. 989, 95th Cong. Sess., reprinted in 1978 U.S.C.A. N 5787, 5810, stating that "...the term insider can also encompass anyone with a 'sufficiently close relationship with a debtor that its conduct is made subject to closer scrutiny than those dealing with arms length with the debtor'." The court further stated "For this second approach, courts look to the closeness of the relationship between the parties." Id. at 509. The court went on to conduct a detailed analysis of whether the relationship of the alleged insider was "similar to or has characteristics of any of the defined relationships [of 11 U.S.C. § 101(31)]." Id., at 510. The court analyzed the relationship of the alleged insider with the company, the fact that he remained a member in the company, still had voting rights in the company and therefore still had some rights and control, all leading to a finding that he was a non-statutory insider.

The Panel used exactly the same standards as applied in other circuits. The Panel never held that in determining non-statutory insider status the relationship must be "the functional equivalent of a statutory insider." *See* Petition page 26. Rather, as clearly stated in the 9th Cir. Opinion, the Panel held that "U.S. Bank presents no evidence that Rabkin had a relationship with Lakeridge comparable to those listed in §101(31)." Village at Lakeridge, 814 F.3d at 1003. The Panel considered that Rabkin had little knowledge of the Debtor or the Debtor's sole member prior to acquiring the claim, had no insider information, did not control the Debtor or any of its members, was not controlled by Kathie Bartlett or any other member, and had no relationship with the remaining four managing members of MBP. The Panel

went on to conclude "U.S. Bank has not shown that Rabkin's relationship with Bartlett-who is indisputably a statutory insider of MBP and Lakeridge-is sufficiently close to compare with any category listed in § 101(31). Id. at 1003.

The Panel employed the proper standard in determining whether Rabkin was a non-statutory insider. The Panel did not add an additional requirement that the relationship must be the "functional equivalent of a statutory insider." Accordingly, the Panel's holding did not create any split among the circuits, and is unworthy of consideration by the Supreme Court on certiorari.

B. The Decision Did Not Create a Split Among The Circuits Regarding The Correct Standard Of Review For Determining Non-Statutory Insider Status.

The Bank argues that the Panel employed an inappropriate standard of review in conflict with other circuits because the Panel failed to consider the insider status as a mixed question of law and fact to be reviewed de novo. This argument by the Bank is simply based upon the Bank's misunderstanding of the meaning of "mixed question of law and fact." This standard of review means that the facts must be considered in light of the applicable legal standards. As discussed above, the Panel employed the appropriate applicable legal standards, which were not in conflict with any other circuit court. Once it is determined that the appropriate legal standard was employed, a review of the facts is, as almost always the case, determined on the basis of a "clearly erroneous"

standard. Even cases cited by the Bank are in support of this standard.

For example, in In re: Cellnet Data Systems, Inc., 327 F.3d 242, 244 (3rd Cir. 2003), cited by the Bank, the Third Circuit held "We review legal conclusions *de novo* and mixed question of law and fact under a mixed standard, affording a clearly erroneous standard to integral facts, but exercising plenary review of the lower court's interpretation and application of those facts to legal precepts" (citation omitted). Similarly, in In re: Windstar Communications, Inc., 545 F.3d 382, 394-395 (3rd Cir. 2009), the court held "Thus we will review the Bankruptcy Court's findings for clear error but exercise 'plenary review of the lower courts' interpretation and application of those facts to legal precepts'" (citation omitted). Finally, In The Matter of Fabricators, Inc., 926 F.2d 1458, 1463 (5th Cir. 1991), the court held "Moreover, when a finding of fact is premised on an improper legal standard, that finding loses the insulation of the clearly erroneous rule" (citation omitted). The court went on to conclude "a determination of insider status is a question of fact and therefore subject to the clearly erroneous standard of review" (citations omitted). Id., at 1466.

The Panel concluded that "The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous." Village at Lakeridge, p.1002. Furthermore, the Panel stated "Rather the bankruptcy court's finding that, on the record presented, Rabkin was not a non-statutory insider is entirely plausible, and we cannot reverse even if we may 'have weighed the evidence differently'" (citation omitted). Id. at 1004.

C. The Panel's Decision Did Not Create A Split Of Authority As To The Applicable Standard Of Review Regarding Non-Statutory Insider Status.

The Panel employed the appropriate legal standard for determining non-statutory status, and did not alter or deviate from decisions in other circuits. The Panel considered the factual findings of the bankruptcy court on a "clearly erroneous" basis, which is appropriate since the Panel was employing the appropriate legal standard. In short, the Panel's decision did not create a split of authority with any other circuit in considering insider status as a mixed question of law and fact.

II. Just Being An "Important" Decision Does Not Warrant Certiorari.

A. The Bank Exaggerates And Misrepresents The Panel's Decision.

The fundamental position of the Bank is that this decision will somehow wreak havoc upon the bankruptcy system. The Bank wants us to believe that the issue before the Panel was whether an insider claim can be transferred to a third party with the purpose of circumventing the Bankruptcy Code's prohibition against insider voting. *See* page 7 of Petition. Of course that question was not raised by the Bank, and was not before the Panel. It is an incendiary comment designed to create an appearance of importance. The Bank argues that the Panel's decision somehow paves the way for many chapter 11 debtors to "game" the system and circumvent statutory prohibitions against voting insider claims. But of course that also was not the issue before the Panel. It

is an issue without factual basis, created by and only in the imagination of the Bank. The Bank complains that creditors should not have to rely upon adjudication of factual issues to determine whether the assignment of an insider claim was in bad faith. *See* page 19 of Petition. However, factual issues are always at the heart of confirming a plan of reorganization. As stated by the Panel "Whether a creditor is an insider is a factual inquiry that must be conducted on a case-by-case basis." Village at Lakeridge, p.1000. The Panel's decision may or may not be important. But the effects claimed by the Bank are fiction. They are not real, are not supported by any examples, and do not create an issue of "importance" within the context of Rule 10. Furthermore, as stated below, simply being "important" does not warrant granting the Petition. All appellants believe their case is important. Within the context of Rule 10, the "importance" must be exceptional, affect an entire industry or large population, or be of national significance. This case does not satisfy any of these requirements.

B. The Panel's Decision Regarding Assignments Does Not Conflict With Other Circuits.

In a passing comment, without analysis, the Bank slips in the allegation that at least two other circuit court decisions conflict with the Panel's decision. *See* page 13 of Petition. The Panel decided that "A person does not become a statutory insider solely by acquiring a claim from a statutory insider..." Insider status pertains only to the claimant; it is not a property of a claim. Because insider status is not a property of a claim, general assignment law-in which an assignee

takes a claim subject to any benefits and defects of the claim-does not apply." Village at Lakeridge, p.999. The Bank cites two decisions which it believes are inconsistent with this conclusion. However, the Bank is wrong, and both decisions directly support the Panel's decision. In In re: Applegate Prop., Ltd., 133 B.R. 827 (Bankr. W. D. Texas (1991), the bankruptcy court rejected the general rule that an entity which acquires a claim steps into the shoes of the claimant, and therefore (under the circumstances of that case) even though the assignor was a non-insider, the assignee was not automatically a non-insider. The court went on to conduct a factual analysis of whether or not the assignee was an insider, and determined that it was, and therefore the claim was an "insider claim." This is exactly consistent with the Panel's decision-just the flip side.

In In re: Holly Knoll Partnership, 167 B.R. 381 (Bankr. E. D. Pa. 1994), the bankruptcy court rejected the general rule that an entity which acquired a claim steps into the shoes of the claimant. As in Applegate the court determined whether the assignee of a non-insider claim was itself a non-insider, and determined that since the assignee was an insider the claim became an "insider claim." Again, this decision is consistent with the Panel's finding.

Any claim by the Bank that the transfer of an insider claim always remains an insider claim, regardless of the status of the holder, is completely devoid of factual support. There is no conflict among circuit decisions, or even among the bankruptcy court decisions, in this regard.

C. General Assignment Law Does Not Apply.

The Bank makes much ado over its assertion that the Panel failed to consider general assignment law. As discussed above, the Panel decided that general assignment law does not apply. The Panel was clearly correct. However, the correctness of the Panel's decision is not a basis for Supreme Court review. This issue does not fall within the purview of Supreme Court rule 10, and does not merit further discussion.

D. The Assignment Issue Does Not Warrant Granting The Petition.

The Bank claims that insider claims remain insider claims regardless of to whom they are transferred. Since the Panel disagreed, the Bank claims this creates an important federal question, as well as a question of "exceptional importance." Why is this an important federal question? According to the Bank, this decision will wreak havoc upon the bankruptcy confirmation process, as well as multiple other bankruptcy statues. Of course this has not happened, primarily because there are other safeguards in the Bankruptcy Code to prevent its abuse. As stated by the Panel:

> "Section 1129 of Title 11 contains a number of safeguards for secured creditors who could be negatively impacted by a debtor's reorganization plan. A court may confirm a plan only if, among other requirements: (1) the plan and plan proponent comply with the bankruptcy code; (2) the plan is proposed in good faith; (3) the plan proponent has disclosed the identity of all insiders and potential insiders; (4) at least one class of impaired claims has accepted the plan

> (and no insider can vote); and (5) the plan 'is fair and equitable, with respect to each class of claims or interests the is impaired under, and has not accepted, the plan.' §1129. In addition, a court 'may designate any entity whose acceptance or rejection of [a] plan was not in good faith, or was not solicited or procured in good faith.' §1126(e). Therefore, U.S. Bank overstates its argument that, unless we reverse the BAP, debtors will begin assigning their claims to third parties in return for votes in favor of plan confirmation. We fail to see how establishing a rule that insider status transfers as a matter of law would better protect the creditor' rights then the current factual inquiry." Village at Lakeridge, p.1000.

More importantly, the Bank fails to explain how this issue fits within the purview of Supreme Court rule number 10. It is not a decision in conflict with another United States court, nor is it "so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Courts supervisory power." Rule 10. It does not rise to the status of an "important question" of federal law that has not been settled by the Supreme Court. The Panel decision does not invalidate any federal or state statute on constitutional grounds, and is not an issue that recurs frequently and consumes substantial judicial resources. It does not involve enormous financial liabilities. The Panel's decision is simply a reasonable and correct interpretation of a federal statute not in conflict with any other circuit decision or state court decision.

CONCLUSION

None of the Bank's arguments warrant certiorari. There is no split of authority among the circuits regarding the proper rest to be employed to determine non-statutory insider status. There is no split of authority among the circuits that the assignee of an insider claim does not automatically remain the holder of an insider claim. The Panel's decision is not the type of "important decision" that warrants certiorari. In reality the Bank is simply seeking another appeal, a task unworthy of the consideration by the Supreme Court.

DATED this 15th day of August, 2016.

Respectfully submitted,

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